No. 15774

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT EDWARD DEUTSCHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief, Criminal Division,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee, United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

No. 15774

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT EDWARD DEUTSCHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
Jurisdictional Statement
and
Statement of the Case.

The Government accepts the statements of jurisdiction and statement of the case as presented by the appellant.

II.
Argument.

A. The Original Sentence Was Void and Illegal.

Appellant adopts an interesting attitude. He states, in effect, that the sentence is entire, *i.e.,* a single sentence, that he began to serve that sentence on June 17, 1957, and that the re-sentencing on the following day was therefore an idle act. Appellee agrees that the sentence should

properly be considered as entire. *Cf. Affronti v. United States,* 350 U. S. 79. However, we disagree with the appellant's conclusions that service of sentence began on June 17, 1957 and that the re-sentencing was illegal.

Appellant's quotation of the statute involved is accurate. The statute incorporates, however, subdivision (d) of Section 7237, Title 26, United States Code, which provides, among other things, that *neither the imposition nor execution of sentence may be suspended* in the type of case here involved. The penalty therein provides that a person convicted under Section 174, Title 21, United States Code, "shall be imprisoned not less than five or more than twenty years" for each offense. Appellant was convicted of two such offenses. His sentence on Count One was proper. His consecutive sentence on Count Three was improper, illegal and void, in that the court had no power under the statute to suspend imposition of sentence.

Title 21, U. S. C., Sec. 174;

Title 26, U. S. C., Sec. 7237(d);

United States v. Bozza, 155 F. 2d 592, 595 (3 Cir., 1946); *Affd.* 330 U. S. 160;

Anderson v. Rives, 85 F. 2d 673, 674 (D. C. Cir., 1936);

Hammers v. United States, 279 Fed. 265, 266 (5 Cir., 1922).

Accepting appellant's contention that the sentence was entire, then it was *entirely illegal.*

Rule 35 of the Federal Rules of Criminal Procedure provides:

"The court may correct an illegal sentence at any time."

The trial court therefore properly recalled the appellant on June 18, 1957 and entered a sentence within its power.

A void sentence does not require the prisoner's release, but requires his return to the court for proper sentence.

Ruben v. Welch, 159 F. 2d 493, 494 (4 Cir., 1947); *cert. den.* 331 U. S. 814.

Appropriate to the instant case is the language of the United States Supreme Court in *Bozza v. United States,* 330 U. S. 160, 167:

> "In this case the court 'only set aside what it had no authority to do and substitute[d] directions required by the law to be done upon the conviction of the offender.'"

So here the court did only what the law required it to do. The first sentence was a nullity and defendant therefore could not begin to serve it. The valid sentence was properly imposed the following day.

B. No Double Jeopardy.

Appellant was not placed in double jeopardy by the re-sentencing. *Bozza v. United States,* 330 U. S. 160. In that case the Supreme Court said, at 166-167:

> "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."

Yet the gist of appellant's contention is that since the judge erred in his sentence on Count Three, he could not thereafter correct the error. To state the proposition is sufficient to indicate its fallacy.

The principal cases upon which appellant relies do not consider the question of re-sentencing after an illegal

sentence, and are therefore inapposite. It is only when service of a valid sentence has begun that the court loses its power to increase the punishment.

Pollard v. United States, 352 U. S. 354, 361;
Wilson v. Buck, 137 F. 2d 716, 721 (6 Cir., 1943).

C. Alternative Reasoning.

If a different approach to the problem is adopted and the sentence is considered to be severable as to the various counts, then appellant had begun to serve the valid sentence on Count One of the indictment. It has been held that where consecutive sentences are imposed, without more, they are to be served consecutively in the same order in which they appear in the indictment.

United States v. Daugherty, 269 U. S. 360;
Henry v. Madigan, 241 F. 2d 659 (9 Cir., 1957).

Under this line of reasoning he still could not be held to have commenced service of the unauthorized probationary sentence originally imposed on Count Three. That was the only part of the sentence which was changed at the re-sentencing on June 18, and this was certainly proper under the *Bozza* cases, *supra,* and other cases cited therewith, and in accordance with the requirements of Rule 35, Federal Rules of Criminal Procedure.

III.
Conclusions.

1. The trial court's initial sentence was not provided for by statute; therefore it was a void act.

2. There is undisputed authority for the proposition that a void sentence may be corrected at almost any time thereafter.

3. Since the initial sentence in the instant case was void, the subsequent valid sentence imposed by the trial court did not place appellant in double jeopardy.

Therefore, the Government respectfully requests that the judgment of the trial court be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief, Criminal Division,

Attorneys for Appellee, United States of America.